APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Civil Action No. 34043

MILLER & LUX INCORPORATED, a Nevada corporation, *Plaintiff*,

v.

J. LEROY NICKEL, JR., *et al.*, *Defendants*.

OLIVER J. CARTER, District Judge.

Plaintiff corporation brings suit against several of its former officers and directors, alleging that while these defendants were in control of the plaintiff, that they conspired to defraud the plaintiff and did defraud the plaintiff by causing various parcels of real property to be conveyed from the plaintiff to themselves, or to be conveyed from the plaintiff to others who held title for the benefit of these defendants. Plaintiff joins numerous defendants who, it is alleged, took title to real property with notice of the plaintiff's rights in that property, and plaintiff also sues numerous defendants by fictitious names. Jurisdiction of this Court is postulated on a diversity of citizenship between the plaintiff, a Nevada corporation, and the defendants, who are alleged to be citizens of states other than Nevada.

The defendants filed a variety of motions attacking the complaint, and plaintiff elected to file a First Amended Complaint. Many of the defendants' motions were renewed against the First Amended Complaint. In order to permit an orderly determination of the issues thus raised this Court ordered a stay of all proceedings until the hearing and determination of the motions attacking the jurisdiction of the Court; the latter motions are the subject of this Memorandum and Order.

Some of the defendants contend that plaintiff has failed to join certain persons who are indispensable parties; that the interests of these absent parties are "aligned" with

the interests of the plaintiff; and that the joinder of those persons as plaintiffs would destroy diversity of citizenship between the plaintiffs and the defendants because some of those persons are citizens of California, as are some of the defendants. This contention is based upon the following facts and reasoning:

The stock of plaintiff corporation is wholly owned by the trustees of the Henry Miller Trust. One of the defendants, J. Leroy Nickel, Jr., who is alleged to have actively defrauded the plaintiff corporation, is also a beneficiary of the Henry Miller Trust. Other defendants who are alleged to have taken title to real property with notice of the plaintiff's right in that property, claim that they are not in pari delicto with J. Leroy Nickel, Jr., and that any recovery by the corporation against those defendants ought to be reduced by the amount that would ultimately go to J. Leroy Nickel, Jr. The other beneficiaries of the Henry Miller Trust are indispensable parties, according to this argument, because there are conflicts of interest between J. Leroy Nickel, Jr. and the other beneficiaries which necessitate the adjudication of their respective interests in the Henry Miller Trust, and the interests of these beneficiaries cannot be determined in their absence.

Put another way, the contention is that in order to reach an equitable result this Court must disregard the corporate entity of the plaintiff and consider that the beneficiaries of the Henry Miller Trust are the true plaintiffs; in that way the Court can settle alleged conflicts of interest between the beneficiaries, and prevent J. Leroy Nickel, Jr. from being an ultimate beneficiary of the corporate recovery.

Defendants have not cited any case in which a court disregarded a corporate entity and then disregarded a trust relationship in addition; defendants have cited Wenban Estate, Inc. v. Hewlett, 193 Cal. 675, in which the Supreme Court of California looked through a corporate entity in accordance with the following principles which are stated by the court at page 697:

"Thus proof that an individual owns all of the stock of a corporation and that the corporation is in truth and in fact but the corporate double of the owner of the stock, will, in conjunction with a further showing that as a result of the double relationship fraud or injustice will inure to a third person, suffice to dissipate the separate identity of the corporation. * * *

"In Erkenbrecher v. Grant, 187 Cal. 7 [200 P. 641], it was held that in order to cast aside the legal fiction of distinct corporate existence it must appear that 'they are the "business conduit and alter ego of one another", and that to recognize their separate entities would aid the consummation of a wrong.'

"Minifie v. Rowley * * * [187 Cal. 481] * * * states the rule to be: 'Before the acts and obligation of a corporation can be legally recognized as those of a particular person, and vice versa, the following combination of circumstances must be made to appear: First, that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person has ceased * * *.'"

These principles are taken by this Court to be a fair statement of the California law applicable here. Upon examination of the facts relied upon by the moving defendants in the case at bar, it is at once apparent that the plaintiff corporation is not the mere alter ego of a stockholder or group of stockholders. Miller & Lux, Incorporated has been a bona fide corporation for many years; it has engaged in a variety of business transactions, and it cannot be said that persons dealing with the corporation were actually dealing with its stockholders. If any closely-held corporation can be said to have an existence separate from its stockholders, this one has.

Defendants cite Western Battery & Supply Co. v. Hazelett Storage Battery Co., 8 Cir., 61 F.2d 220, for the proposition that if the beneficiaries of a trust are equitably

precluded from relief, the trustees are likewise precluded; but the trust involved in that case was little more than a sham, as indicated by the following portions of the opinion of the court, (61 F.2d at page 231):

> "Considering the nature of the trust, the sole beneficiaries thereof could have put an end to it at any time.
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> * * * * *
>
> "* * * the interest of the beneficiaries of a trust of the nature here involved approaches so nearly to complete ownership, with all the incidents thereof, as to justify the conclusion that a license agreement entered into by all the beneficiaries may bind the trustee."

The beneficiaries of the trust under consideration in the case at bar could not end the trust at will, nor could they be considered virtually the owners of the trust res. Furthermore it is significant that in the Western Battery case all the beneficiaries participated in the acts which the defendant relied upon to bar the recovery sought by the trustee; here, on the other hand, most of the beneficiaries are not accused of wrongful conduct. Therefore the moving defendants have not shown sufficient reason for this Court to disregard either the corporation or the trust, and certainly no reason to disregard both of them.

Here as in Sauer v. Newhouse, D.N.J., 24 F.Supp. 911, complete relief can be given as between plaintiff and the defendants without joinder of other parties. The Sauer case was a representative suit by stockholder of a corporation against certain directors of the corporation; the plaintiffs prayed for restitution to the corporation for losses resulting from alleged misconduct of the defendants. The defendants moved to join two former directors who, the defendants alleged, had concurred in the wrongful acts and were indispensable parties. The court said, 24 F.Supp. at page 912:

> "The only utility in ordering the addition of the omitted parties would be the avoidance of a possible

suit for contribution instituted by those already defendants against the omitted parties in the event that judgment goes against the present defendants in this action. * * * Complete relief can be afforded plaintiffs without the addition of parties demanded. Hence, they are not necessary or indispensable." Compare Sadler v. Sadler, 9 Cir., 167 F.2d 1.

It is the opinion and conclusion of this Court that the trustee and beneficiaries of the Henry Miller Trust are not indispensable parties to this action.

Some of the defendants make a further contention with regard to absent parties. The argument is that various persons who have not been made parties to this suit are indispensable parties defendant, and their joinder as defendants would destroy diversity judisdiction because they are residents of Nevada, as is the plaintiff. These parties are alleged to be indispensable because if this Court were to order some of the defendants to reconvey to the plaintiff property that was acquired from the plaintiff, the intervening interests of the absent parties would be destroyed or adversely affected. But this argument overlooks the fact that the prayer of the First Amended Complaint is for specific relief, such as the return to plaintiff of property held by the defendants, or in the alternative for damages.

An individual who has acquired title to property by fraud has a voidable title, and has the power to convey a good title to a good faith purchaser for value. Plaintiff recognizes the possibility that the rights of innocent third persons may have intervened in some of the transactions attacked in this suit; consequently this suit is for the return of the property if that can be done without disturbing the rights of innocent parties, or for damages if the property cannot be returned.

None of the cases cited in support of defendants' contention are controlling here. In Baten v. Nona-Fletcher Mineral Co., 5 Cir., 198 F.2d 629, the relief sought was the cancellation of deeds. The court said (at pages 630-631):

"* * * the real purpose of this suit is to cancel and set aside the conveyances * * *."

There was no prayer for money damages. In Keegan v. Humble Oil & Refining Co., 5 Cir., 155 F.2d 971, the plaintiff asked to be declared owner of certain property, and to grant that relief would have destroyed an interest in that property belonging to an absent party. Calcote v. Texas Pacific Coal & Oil Co., 5 Cir., 157 F.2d 216, was a suit for cancellation of an oil lease. If the lease were cancelled, royalty interests of absent parties would have been destroyed. In Young v. Garrett, 8 Cir., 149 F.2d 223, a state statute provided that an executor or administrator, rather than the heirs of a decedent, were the only proper plaintiffs in the type of suit there involved; therefore the administrator of the decedent was held to be an indispensable party. In Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, the holding of the court on the issue of indispensable parties, and the inapplicability of that case to the situation in the case at bar, are both indicated by the following statement of the court at page 262:

> "* * * in an action wherein it is to be determined that the sublessee has committed acts which forfeit the parent lease, the sublessors, who are the owners and holders of such lease, should be parties."

In the case of State of Washington v. United States, 9 Cir., 87 F.2d 421, the court held that where the State of Washington had leased property to a private party, and the United States sued to recover possession from the lessee, claiming to be the owner of that property, that the State of Washington was an indispensable party because to grant the relief sought by the United States would be to adversely affect the interest of the State of Washington. The court said (87 F.2d at page 430):

> "The lessor is affected * * * because the thing, which he claims he owned at the time of the grant to the lessee, and which he claims will revert to him, is declared by the decree to be nonexistent."

American Insurance Co. v. Bradley Mining Co., N.D.Cal., 57 F.Supp. 545, is not even remotely similar to the case at bar. There certain parties were found to be indispensable because they had brought a similar action in a state court, and therefore there was a possibility of the issues being determined one way in the federal court and the opposite way in the state court, which would not have been equitable in the circumstances of that case.

These cases cited by the defendants generally involve a situation in which specific relief is prayed for, and to grant that relief would destroy or adversely affect the interests of an absent party. Here the prayer is for damages as an alternative form of relief. If innocent third parties have acquired interests in some of the property which plaintiff seeks; this Court can award damages in lieu of that property (in the event of an ultimate decision in favor of the plaintiff) and frame its decree so as to protect the interests of those absent parties. See Hudson v. Newell, 5th Cir., 172 F.2d 848, 850, subsequent opinion 174 F.2d 546, in which the court said:

> "A court cannot adjudicate the rights of persons who are not parties before it; they will be brought in if possible and if they will not destroy diversity. . . . If diversity will be thereby destroyed the court will not require them to be brought in, but will enquire if there is any relief it can properly give without them; if there is, it will give it without prejudice to the rights of the absent; if none can be given the suit will be dismissed."

Therefore it is the opinion of this Court that there are no absent parties who are indispensable parties defendant.

Defendants further contend that the executors of the estate of Max B. Arnold, who are defendants in this suit, are citizens of Nevada as is the plaintiff and that there is not complete diversity of citizenship between the plaintiff and all the defendants. Plaintiff has moved to dismiss the executors of the Arnold estate as parties. The executors

of the Arnold estate are not indispensable parties and therefore it is proper to permit a dismissal as to them, in order to establish the jurisdiction of this Court.

The leading case on the point in this circuit is Dollar S. S. Lines v. Merz, 9 Cir., 68 F.2d 594, 595, where the court said:

> "Where, because of the joinder of proper, though not indispensable, parties as defendants, there is not merely on the record but in fact no such diversity of citizenship as to give jurisdiction, the District Court may permit a dismissal of such parties and thereby establish jurisdiction with retroactive effect." (Citations omitted.)

See also Atchison, T. & S. F. Ry. Co. v. Franeom, 9 Cir., 118 F.2d 712; Finn v. American Fire & Casualty Co., 5th Cir., 207 F.2d 113.

Therefore plaintiff's motion to dismiss the executors of the Arnold estate will be granted.

Another basis for motions by the defendants to dismiss is that the complaint does not establish diversity jurisdiction because the plaintiff has sued a large number of fictitious parties. The recent case of Molnar v. National Broadcasting Co., 9 Cir., 231 P.2d 684 (Jan. 4, 1956), supports the defendants' contention and is controlling here.

In the Molnar case the plaintiff sued the named defendant and ten "Doe" parties. Jurisdiction of the court was predicated upon diversity of citizenship, and the complaint contained the allegation that: "Plaintiff is a citizen and resident of the State of California; defendants, and each of them, are citizens and residents of the State of Delaware." The court of appeals held:

> "If the identity of defendants were known so that the pleader could state they were citizens of Delaware, she could also state their names and allege what part each had in the management and control of the stairway. But, if the allegation that they are citizens of

> Delaware, be, as on the face of the complaint it is, unfounded guesswork, the jurisdiction of the court is not established."

The pertinent allegations of the First Amended Complaint in the case at bar are found in paragraph I of that complaint:

> "The plaintiff is a corporation incorporated under the laws of the State of Nevada. • • • The defendants Doe Thirty to Doe Two Thousand are citizens of states other than the State of Nevada."

It is obvious that the allegations pertaining to the citizenship of the "Doe" parties in the case at bar are mere guesswork, and therefore this Court must follow the Molnar case by ordering the dismissal of this action unless the plaintiff either drops the fictitious parties or identifies them with sufficient clarity so that this Court could find that actual persons are contemplated by the allegations pertaining to those parties. This action is in accord with the holding of Roth v Davis, 9 Cir., 231 F.2d 681 (Jan. 5, 1956).

Plaintiff will be allowed twenty days in which to amend its complaint in this respect.

Counsel for plaintiff are directed to prepare and submit an appropriate order.

Dated: May 15, 1956

/s/ OLIVER J. CARTER
U. S. District Judge

[Endorsed:] Filed May 15, 1956

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Civil Action No. 34043

MILLER & LUX INCORPORATED, a Nevada corporation,
Plaintiff,

v.

R. H. ANDERSON, ET AL., *Defendants.*

WOLLENBERG, District Judge.

Memorandum Opinion

This is an action by Miller and Lux, a Nevada corporation, to nullify certain conveyances of land by it to various defendants who are residents of states other than Nevada. As federal jurisdiction is based on diversity of citizenship, California law is controlling.

Plaintiff alleges in its second amended complaint, in support of its prayer to nullify the conveyances, that three of its directors, who were all of its shareholders, and certain other persons, including all of the defendants herein, who were transferees of the properties sold, conspired to enrich themselves and others at plaintiff's expense and to defraud plaintiff in violation of their fiduciary obligations to plaintiff by conspiring to:

1. Make profits on the purchase and sale of land without revealing to it such profits;

2. Cause it to sell lands to its officers and agents directly, or indirectly through dummies, at a price less than that which should have been obtained;

3. Conceal from it the existence of the conspiracy.

Plaintiff further alleges that it was not able to protect itself from these conspiracies and to enforce its rights at an earlier date because it was a "captive" corporation. It was "captive," plaintiff asserts, because each of its shareholders, directors and officers were either active parties to the conspiracy to defraud or were dominated by and sub-

servient to the parties to the conspiracy during its entire period.

Defendants move to dismiss the suit for failure of plaintiff to state a cause of action for which relief can be given. Plaintiff's complaint shows that all those persons who constitute plaintiff's corporate being had knowledge and approved of the transaction complained of and such approval may be found on the company's books. It is an elementary proposition of law that fraud requires complainant's lack of knowledge and that affirmance waives fraud. As stated in Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809 (1896): "The plaintiff is but the representative of its stockholders, and can have no rights in the matter other than in behalf of its stockholders; and, if all of the stockholders authorized the release, the plaintiff was not defrauded." Notice to all of the stockholders of a matter so intimately affecting their rights must be deemed notice to the corporation. What we have here, however, is more than mere notice to the corporation. We have plaintiff alleging in his complaint actual knowledge on the part of all the stockholders of the corporation who would be entitled to complain of the wrong.[1] As unanimous consent renders fraud impossible, no wrong has been done to the plaintiff.

But plaintiff also alleges in its second amended complaint that its stock was held in trust and that the beneficiaries of the trust did not ratify or have knowledge of the transaction. Plaintiff argues in his briefs that since it is the beneficiaries who are ultimately defrauded, the corporation should be allowed to sue in their behalf, as well as its own. In support of this contention plaintiff cites Dolese Bros. Co. v. Brown, 157 A. 2d 784 (1960), a Delaware case, which holds that those holding stock as trustees or agents cannot ratify a fraud upon the company without full disclosure to the beneficial owners of the stock. In Dolese, the president and dominating director of a closely held corporation obtained general powers of

[1] See generally, White v. F.D.I.C. 122 F. 2d 770, (4th Cir. 1941) cert. den. 316 U.S. 672 (1942).

attorney through fraudulent misrepresentations and concealment of certain facts from members of the family who trusted him and who were without experience and knowledge of business activities. A corporation cannot sue when all of the shareholders consent to a transaction; but the Court agreed that consent not freely given with full knowledge of the facts is not consent at all and it allowed the suit as the rights of third parties were not involved.

At bar, however, we have no fraud on the legal owners of the stock. It is the legal owners who have acted and it is they who have a legal right to act. They at no time were ever required to obtain the consent of the beneficial owners of the trust to act in their capacities as trustees or shareholders of Miller and Lux, Incorporated. They were not mere holders of proxies from the legal owners as in Dolese. Also, here, it is only the rights of third party transferees who are involved.

Stockholders who are trustees of stock are nonetheless stockholders with all the powers and rights of stockholders Their fiduciary obligations to their beneficiaries do not deprive them of their status as shareholders or make the beneficiaries shareholders in their place. They and they alone hold the legal title to stock and the right to vote it and exercise all other rights incident thereto. "Shares standing in the name of any person as * * * trustee * * * may be voted and all rights incident thereto may be exercised only by the * * * trustee * * * in person or by proxy, and without proof of authority." Cal. Corp. Code Sec. 2218.

As stated by the Supreme Court of California in Market Street Ry. Co. v. Hellman, 109 Cal. 571, 42 P. 225 (1895):

> "Some of the stock was held and voted by trustees who not only appeared upon the books of the corporation as such, but were really and in fact trustees for other persons. The contention of appellant is that a trustee of stock has no authority to destroy the corporation by merging it with another corporation. The answer to the proposition must be that the trustee

is the legal owner of the stock, and as against the corporation and all the world, except his cestui que trust, no inquiry may be had touching his actions in the premises. (Civ. Code Secs. 307, 312)."

If a wrong had been done to the corporation, its claim would be barred by the statute of limitations. Assumming the three year statute for fraud is applicable (CCP Sec. 338(4)), plaintiff alleges its complaint has been filed within the appropriate time. Plaintiff claims the discovery was not made sooner, even though the records of all the transactions involved were apparent on the company's books and were matters of public record, because it was a "captive" corporation. However, under the facts as alleged, the plaintiff herein was not a captive corporation. Lady Washington C. Co. v. Wood, as cited above, at pp. 487-9. If the five year statute of limitations for the recovery of real property were applicable (CCP Sec. 318), there is no doubt plaintiff's claim would be barred.

If it can be said that plaintiff may bring this action it is defendants' contention that plaintiff has failed to join indispensable parties whose joinder herein will destroy jurisdiction. The interest of the beneficiaries and the trustees of the Henry Miller trust must be determined. It is plaintiff's theory in this argument that it is the breach of this trust that is the foundation of his claims. There is no question that the trustees of the trust as legal owners of all of the stock in plaintiff's corporation have an interest, nor that the beneficiaries also have an interest as by plaintiff's argument they are the ones wronged by the transactions complained of. It is also to be noted that plaintiff charges in his complaint that some of the beneficiaries are wrongdoers—in fact at least one is charged as a party to the conspiracy. Therefore, there are conflicting interests among these beneficiaries which must be litigated herein. In order for this Court to enter any judgment equitable in nature, the respective positions of the various beneficiaries must be

determined.[2] It is apparent, therefore, that this action will fail on jurisdictional grounds if these indispensable parties are brought in.

For the reasons stated above defendants' motions to dismiss are hereby granted.

Pending herein is a motion of plaintiffs to substitute the personal representatives of Harry H. Magee, deceased. This motion is denied and the plaintiff's complaint dismissed as to Harry H. Magee. In view of the above order dismissing plaintiff's complaint as to the other defendants, and as the same reasons would apply to defendant Magee, it would be of no purpose to grant the motions to substitute.

Dated: March 12, 1962.

/s/ ALBERT C. WOLLENBERG,
U. S. District Judge.

[Endorsed:] Filed March 12, 1962.

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[2] See, State of Washington v. United States, 87 F. 2d 421 (9th Cir. 1936) for a discussion of the test to be applied to determine who are indispensable parties.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

June 18, 1963

No. 18,033

MILLER & LUX, INCORPORATED, a Nevada corporation, *Appellant*,

vs.

R. H. ANDERSON; GRACE C. ANDERSON; ET AL., *Appellees*.

No. 17,929

MILLER & LUX, INCORPORATED, a corporation, *Appellant*,

vs.

ALLEN L. CHICKERING, CHARLES R. BLYTH, HARRY H. FAIR, J. J. HUNTER, and THE BANK OF CALIFORNIA, a National Banking Association, *Appellees*.

On Appeal from the United States District Court for the Northern District of California, Southern Division

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Before: MADDEN, Judge of the Court of Claims, and MERRILL and BROWNING, Circuit Judges.

MADDEN, Judge:

These two appeals, which we will treat in one opinion, are from orders of the United States District Court for the Northern District of California, Southern Division, dismissing appellant's complaints. In the Anderson case the complaint names as defendants some sixty individuals, partnerships and corporations. In the Chickering case there are five defendants, four being individuals and the fifth a banking corporation. Each complaint alleges, in substance, that the appellant is a Nevada corporation, the stock of which was, at all times mentioned in the complaint, held in trust by three trustees of the Henry Miller Trust;

that, beginning at some time prior to 1927 and continuing thereafter, one J. Leroy Nickel, Jr., a trustee as well as a beneficiary of the trust, and a director and officer of the appellant; James E. Fickett, a director and the president of the appellant; J. E. Wooley, a trustee of the trust, and a director and officer of the appellant; and A. R. Olsen, a trustee of the trust and a director and officer of the appellant, acted in violation of their fiduciary obligations to the appellant, to enrich themselves and others at the expense of the appellant and to defraud the appellant. The activities of Fickett, Wooley and Olsen did not cover the entire period from 1927 to 1954, as did those of J. Leroy Nickel, Jr.

The complaints[1] recite the misdeeds and wrongs of the four persons named above as:

(1) Making and keeping profits on the purchase and sale of appellant's land and interests in land, through the use of their positions of influence and power in appellant corporation, without revealing to appellant the existence, nature and extent of such profits;

(2) Causing appellant to sell lands and interests in land to Fickett and Nickel and to various other officers and agents of appellant, directly or indirectly, through the device and by means of strawmen, dummies, nominees and by other means, at less than the price that should have been obtained by the appellant, so as to realize profits by later or simultaneous resale, lease, rent or other use of said land or interests in said land, and to retain such profits for themselves, the wrongdoers.

(3) Causing appellant to sell to themselves and others, at a price less than should have been obtained by appellant, lands and interests in land without disclosing to appellant their value as actual or potential oil and gas bearing lands, so as to realize and retain for themselves profits upon

[1] The word "complaint" in this opinion refers to the second amended complaint in the Anderson case, or the first amended complaint in the Chickering case, as the context will indicate.

later or simultaneous resale, lease, rent or other use of or dealings in the lands.

(4) Concealing from appellant and all others the existence of their conspiracy and wrongdoings.

The complaints name numerous persons who are said to have joined in the conspiracy with full knowledge of the existence and purposes of the conspiracy. Some of the persons so named are made defendants in the complaint in the Anderson case. Many of them are not made defendants. They are alleged to have caused the appellant to transfer, lease, assign or otherwise dispose of its lands and interests in lands, as more particularly described in exhibits 1 to 67 to the complaints. These exhibits contain details of conveyances, with dates, descriptions and names of grantees. The exhibits are incorporated by reference in the complaints.

A considerable number of defendants listed in paragraph XXII of the complaint in the Anderson case seem not to be charged with having knowingly joined in the conspiracy to defraud the appellant, but to be charged only with having purchased and taken their conveyances, leases, assignments and transfers "with notice or knowledge that in so purchasing, leasing or taking said lands and interests in land they were participating in and helping to accomplish the defrauding of plaintiff [appellant] and the violation of fiduciary duties owing to plaintiff [appellant] by its directors, officers, agents, and others."

The facts stated in this opinion are facts alleged by the appellant in its complaint and, in some instances, facts stated by appellant in admissions and in answers to interrogatories in these cases. There has been no occasion to introduce any proof of the facts so stated.

The complaints allege that after the various grantees named in exhibits 1 to 67 above received their conveyances, they drilled oil and gas wells on the land and took the products of these wells, and are now in possession of the lands and of the proceeds of their use.

The appellant alleges that during the many years that it was being defrauded by its directors, officers and agents, it was held completely captive and dominated by its directors and officers who were parties to the conspiracy, and was therefore powerless and unable to protect its interests. On June 13, 1954, certain beneficiaries of the Henry Miller Trust filed a suit in the Superior Court of the State of California in and for the City and County of San Francisco, the principal object of which suit was to remove J. Leroy Nickel, Jr., A. R. Olsen and J. E. Wooley, the then trustees of the Henry Miller Trust, from their positions as trustees, and to procure the appointment of successor trustees. The trustees resigned or were removed, new trustees were appointed, they as owners of the stock of appellant corporation removed J. Leroy Nickel, Jr., Olsen and Wooley as directors and officers of appellant corporation, elected an independent board of directors of appellant, which board appointed new officers. The new trustees of the Henry Miller Trust and the new directors and officers of appellant corporation promptly made an investigation which disclosed the wrongs committed against the appellant. Within three months after the appointment of the new directors and officers of the appellant, the Anderson suit was filed in 1954. The Chickering suit was not filed until 1957, because not until then did appellant discover the part which, it says, the five defendants in the Chickering case played in assisting the wrongdoing directors, officers and trustees to conceal their wrongdoings.

The complaint in the Chickering case, in its paragraph XXIX-F, alleges that directors, officers and agents of the appellant corporation purchased a large number of the appellant's bonds and notes at less than their face value and enforced them against appellant at their face value, in violation of their fiduciary obligation to the appellant.

The complaint in the Anderson case asks for a judgment and decree that the defendants hold the properties described in exhibits 1 to 67, together with all proceeds, profits and income from those properties, as constructive trustees for the appellant, and restore and return them to appel-

lant; that the defendants be required to make an accounting to the appellant of profits made at appellant's expense; that in the event that the appellant's properties have been so transferred that constructive trusts cannot be impressed upon them, the appellant have judgment against the defendants and each of them for one hundred and ten million dollars, with interest and costs, and reasonable attorneys' fees.

In the Chickering case, the relief demanded is judgment against the defendants in the amount of one hundred and ten million dollars.

The appellant corporation is a family corporation dating back to 1908. Its founder, Henry Miller, by an inter vivos transfer in 1913 and a testamentary transfer in 1916, put all the stock of the plaintiff corporation into the Henry Miller Trust, where it has remained since that time. The trust *res* of the trust is owned by three trustees. The beneficiaries of the trust, following Henry Miller's death in 1916, were his daughter Nellie Miller Nickel and her husband, J. Leroy Nickel, Sr., for their lives and the life of the survivor of them; then their children and the issue of any deceased child, per stirpes, for life, until the death of the last of the children of Nellie Miller Nickel and J. Leroy Nickel, Sr., at which time the corpus of the trust was to be distributed to the descendants of such children, per stirpes, in fee.

Henry Miller died in 1916. His daughter Nellie Miller Nickel and her husband J. Leroy Nickel, Sr., and their three children were then living. The children were J. Leroy Nickel, Jr., George W. Nickel and Beatrice Nickel Morse. J. Leroy Nickel, Sr., died in 1937 and his wife Nellie Miller Nickel died in 1944. J. Leroy Nickel, Jr., married but had no children; George W. Nickel had four children; Beatrice Nickel Morse had three children. These seven children and their descendants are the contingent remaindermen under the Henry Miller Trust.

J. Leroy Nickel, Jr., died in 1959. The other two children of Nellie Miller Nickel and J. Leroy Nickel, Sr., viz. George

W. Nickel and Beatrice Nickel Morse, were also life beneficiaries of the trust. The record does not disclose whether or not they are living. Their respective children and more remote descendants were, as we have seen, contingent remainder beneficiaries of the trust.

The complaints allege that J. Leroy Nickel, Jr., Wooley, and Olsen, as trustees of the Henry Miller Trust, owned all the stock of the appellant corporation from 1944 to 1954. They elected its directors, selected its officers, and were in complete control of its affairs. In the appellant's original complaint, filed in 1954, in the Anderson case, J. Leroy Nickel, Jr., J. E. Wooley, and A. R. Olsen headed the list of the numerous defendants against whom restitution and damages were sought. On November 19, 1954, on motion of the appellant, the action was dismissed, without prejudice, as to the defendant A. R. Olsen. In the appellant's first amended complaint filed October 31, 1955, neither Wooley nor Olsen was named as a defendant, but J. Leroy Nickel, Jr., was so named. But on appellant's motion the action was dismissed, without prejudice, as to J. Leroy Nickel, Jr., on December 20, 1955. In appellant's second amended complaint, filed on April 17, 1958, neither J. Leroy Nickel, Jr., nor Wooley nor Olsen was named as a defendant. However, in the body of the second amended complaint, as in the two earlier versions of the complaint, J. Leroy Nickel, Jr., Wooley and Olsen, together with one James E. Fickett, then deceased, were named as the persons primarily responsible for the looting of the plaintiff corporation by putting in their own pockets profits which rightfully belonged to the corporation.

From what is recounted above, one gets the impression that if the cases are tried on the present amended complaints the trial will be a playing of Hamlet, without the presence of Hamlet. There will be much evidence as to the wrongs which J. Leroy Nickel, Jr., Wooley, Olsen, and Fickett did to the appellant corporation, and as to the manner in which they profited from those wrongs, but there can be no judgment requiring those primary wrongdoers, or their estates, to disgorge the profits and reimburse the appellant corporation.

It it be said that this is none of the business of the defendants against whom judgments are sought, that a wrongdoer cannot complain that another wrongdoer, also responsible for the same tort, is not sued for it, we suppose that this doctrine is not necessarily of universal application. The instant suit seeks to impose constructive trusts and liability for damages upon numerous persons who now have title to numerous properties. As to some of them, all that is charged against them is that they took title to the property when they knew that their predecessor in title had acquired title through a breach, by a director or agent of the appellant, of his fiduciary duty to the appellant. We think a court of equity would not be performing its role as such if it assumed that the defendants included in the second amended complaint are *in pari delicto* with the primary wrongdoers named, but not made defendants in the complaint. A court of equity might well conclude that it should not require the party least at fault to bear alone the entire responsibility for the wrong.

If it is suggested that these primarily guilty actors may have paid back to the appellant corporation what they stole from it, the court and the remaining defendants would be entitled to know that. To whatever extent such payments have been made, they are *pro tanto* credits on the claims made by the appellant against the remaining defendants. If settlements have been made and releases given to the primary wrongdoers for less than full compensation for their wrongs, or for less than would have been practically recoverable, that might well be of interest to the court and to the remaining defendants.

The complaint in the Anderson case, in paragraph XI, says:

> From and after 1927 and at all times herein mentioned until July 22, 1954, each of plaintiff's [appellant's] directors and officers was either an active party to the conspiracy set out in paragraph XIII or dominated by and subservient to the parties to said conspiracy, and plaintiff was a complete captive of said directors and officers and was therefore at all times completely

powerless and unable to protect its interests and to seek a remedy for the wrongs and injuries herein above set forth until July 22, 1954.

Beginning in 1927, which was when the operation of the conspiracy began, one of the three trustee-stockholder directors of appellant was J. Leroy Nickel, Jr. As we have seen, he is alleged to have been the ringleader of the conspiracy to defraud the appellant. His position and his activities continue down to 1954, when he was removed from his position as trustee and as a director and officer of appellant. From 1929 to 1944 Nellie Miller Nickel, the daughter of Henry Miller, was one of the three trustees of the Henry Miller trust. She was a director of the appellant corporation from 1941 to 1944. She was a life beneficiary of a one-half interest in the trust from 1916 until 1937, and the sole life beneficiary from 1937 until her death in 1944. Her husband, J. Leroy Nickel, Sr., was the third trustee of the trust from 1920 until 1937. As such, he was a stockholder of appellant corporation, of which he was a director from 1920 to 1937. He was a life beneficiary, with a one-half interest, in the trust. He died in 1937. J. E. Wooley succeeded him in 1937 as a trustee of the trust and as a stockholder and director of appellant. He was not a beneficiary of the trust nor a member of the Miller family, but, as we have seen, was active in the conspiracy to defraud the appellant, until he was removed in 1954. Upon the death of Nellie Miller Nickel in 1944, A. R. Olsen succeeded her as a trustee, and as a stockholder and director of appellant, and continued in those capacities until he was removed in 1954. Upon the death of his mother, Nellie Miller Nickel, in 1944, J. Leroy Nickel, Jr., became a life beneficiary of a one-third interest in the trust. He died in 1959.

As shown in the foregoing recitals, during the period 1927 to 1937, J. Leroy Nickel, Sr., was a life tenant of a one-half interest in the Henry Miller Trust. He was a director of appellant corporation and is alleged in the complaint to have been subservient to the will of the conspirators. Nellie Miller Nickel was the sole life tenant of the

trust from 1937 to 1944. From 1941 to 1944 she was a director of appellant corporation and was subservient to the will of the conspirators. J. Leroy Nickel, Jr., was a director of appellant corporation from 1920 to 1954. Upon the death of his mother, Nellie Miller Nickel, in 1944 he became a life tenant of a one-third interest in the trust. He was, as we have seen, the ringleader in the conspiracy.

If there should be a recovery in this suit and an accounting by the defendants to the appellant for income, rents and profits earned by the defendants from the diverted lands, it would seem to follow that a part of the recovery should go to the estates of the life tenants who would have received the income, rents and profits if the appellant's land had not been fraudulently disposed of.

All the shares of the stock of the appellant were held by the three trustees of the Henry Miller Trust from as far back as 1920. They elected themselves, and some other persons, directors of appellant. In 1939 evidence of what is alleged to have been the conspiracy to despoil the appellant was presented to the board of directors in two successive meetings, was discussed, and the following resolution was adopted:

> Now, Therefore, Be it Resolved: That this matter be considered closed and no further investigation is requ[illegible].

Participating in this meeting were J. Leroy Nickel, Jr., A. R. Olsen, and J. E. Wooley, together with the other directors. Judge Sloss, a director, opposed the resolution. As we have seen, J. Leroy Nickel, Jr., was from 1920 to 1954 one of the three trustees of the Henry Miller Trust. J. E. Wooley was one of the trustees from 1937 to 1954. A. R. Olsen was the third trustee from 1944 to 1954.

Judge Wollenberg, in the district court, dismissed the appellant's complaints, assigning as one of his grounds of dismissal the fact that the owners of the appellant were shown by the allegations of the complaint to have knowingly consented to and ratified the alleged wrongs to the

corporation. He said, "As unanimous consent renders fraud impossible, no wrong has been done to the plaintiff." For that reason, he said, the complaints failed to state causes of action.

In these appeals the appellant urges that the district court was in error in failing to give weight to the fact that the three shareholder directors of appellant held their title to the stock as fiduciaries, i.e. as trustees for the beneficiaries of the Henry Miller Trust. It recognizes that "a person owning all the legal and equitable interest in a corporation may give those assets away if he desires to—ignoring the corporate entity.' He will not later, by use of the corporate entity, be heard to complain." That a corporation is hurt, or destroyed, by the intended conduct of the owners of its shares, gives rise to no legal claims, either in the shareholders, or in the corporation as a legal entity. If all of the shares of a corporation were owned by trustees, and an agent of the corporation offered some of its assets for sale at what seemed to be less than the market price, and a purchaser cautiously inquired of each of the shareholders as to whether he was aware of and content with the price at which the assets were being offered, and was assured that the shareholders were content, and thereupon made the purchase, and was later sued by the corporation for having committed a wrong against it, he would, naturally, wonder what he had done that was wrong. If he was told that what was wrong was that the shareholders did not really own the shares, but owned them as trustees for other persons, he would wonder how he was supposed to have known that. And if, in fact, he did not know it, he would not be under any liability to anyone, and certainly not to the corporation with which he had dealt. If he did know of the trusts, thereby knowing that the stockholders were being generous with assets which they did not own, he would be liable, but the wrong would not be a wrong against the corporation but against the beneficiaries of the trust. If the trustees repented of their wrong, they might, as trustees, bring suit to recover the assets, and to restore them to their place in the corporation's stock, if that was

where the court thought they belonged. Wetmore v. Porter, 92 N.Y. 76.

In the consideration of such problems, and of the particular problem of the instant cases, the corporation, as such is quite irrelevant. The questions are (1) did the trustees wrong the beneficiaries and (2) were the persons who dealt with the corporation purchasers without notice of the fact that the trustees were committing breaches of trust?

It follows from what we have said that, in our opinion, the beneficiaries of the Henry Miller Trust are the persons, and the only persons, who have rights in the instant situation. The appellant corporation was the instrument by which the conspirators despoiled the assets of the trust. It is not in the position of a repentant trustee. It was not the trustee, it was the despoiled trust res. The interposition of the corporation in this litigation is of no conceivable use. The beneficiaries have always, in equity, owned the corporation and its assets. They still own them, depleted as they are alleged to be. There is no need for this inanimate entity, the corporation, to spring to life and speak for them. They can speak for themselves. When they do speak, and when those whom they accuse answer them, the dialogue will not be obfuscated by doctrines about whether, and to what extent, the corporate veil may be pierced. Questions as to who were beneficiaries at particular times, whether their conduct was such as to make recovery for their benefit inequitable, whether and to what extent they had already been paid by the wrongdoers, would seem to be highly relevant. In brief, the obvious advantage of having the real parties in interest in court will be present.

When the frauds of the then trustees were discovered, or were first acted upon, it was the beneficiaries of the trust who brought suit, in 1954, in the Superior Court of California, which suit resulted in the removal of the unfaithful trustees and the appointment of others. That direct, nonincumbrous procedure could well have been followed by suits by the beneficiaries against the unfaithful trustees.

their confederates, agents, the appellant corporation which had been an instrument in their fraudulent acts, and purchasers who took with notice. In such a suit a court of equity could have proceeded with confidence that it could do equity.

The judgments of the district court dismissing the complaints are affirmed.

(Endorsed) Opinion Filed June 18, 1963.

Frank H. Schmid, Clerk.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18,033

MILLER & LUX INCORPORATED, a Nevada corporation,
Appellant

vs.

R. H. ANDERSON, ET AL., *Appellees*

APPEAL from the United States District Court for the Northern District of California, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause dismissing the complaint be and hereby is affirmed with costs in favor of the appellees and against the appellant.

It is further ordered and adjudged that appellees recover against appellant for their costs herein expended and have execution therefor.

Filed and entered June 18, 1963

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[*Endorsed*:]
Filed
Aug. 19, 1963
Frank H. Schmid, Clerk

No. 18,033

MILLER & LUX, INCORPORATED, *Appellant*,

vs.

R. H. ANDERSON; GRACE C. ANDERSON; ET AL., *Appellees*.

No. 17,929

MILLER & LUX, INCORPORATED, *Appellant*,

vs.

ALLEN L. CHICKERING, CHARLES R. BLYTH, HARRY H. FAIR, J. J. HUNTER and THE BANK OF CALIFORNIA, a National Banking Association, *Appellees*.

Order

Before: MADDEN, Judge of the Court of Claims, and MERRILL and BROWNING, Circuit Judges

The petition for rehearing, suggestion for rehearing en banc, and motion to hear and determine applications for indemnity are denied. Judge Madden, sitting on this court by special assignment, did not participate in the consideration or disposition of the suggestion for rehearing en banc.

/s/ J. WARREN MADDEN
Judge of the Court of Claims

/s/ CHARLES M. MERRILL

/s/ JAMES R. BROWNING
United States Circuit Judges